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Violations of the right to education

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I. INTRODUCTION

1. Although all human rights are indivisible, interdependent and interrelated, the right to education is, more than most, closely linked to the realization of all other human rights. Education is both a human right in itself and an indispensable means of realizing other human rights: civil, cultural, economic, political and social. It is the primary vehicle by which economically and socially marginalized people can lift themselves out of poverty and obtain the means to participate fully in national life. Its impact is thus felt in the future, as much if not more than in the present. Education benefits societies as well as individuals. Given the ever more rapid pace of scientific and technological change, the uneven distribution of scientific and technological knowledge and resources, and the intense, and increasing, economic competition among nations, Governments have a large stake - and reason to invest - in the education of their citizens. The importance of education transcends the practical and instrumental. A well-stocked and active mind, able to range freely and widely, is one of the joys and rewards of human existence. The International Covenant on Economic, Social and Cultural Rights acknowledges this in referring to the role of education in "the full development of the human personality". Education is indispensable in developing tolerance and appreciation and respect for differences, which is also a key component of education as a human right. Unlike most of the other economic, social and cultural rights, the dominant role of Government in education and the allocation of significant State resources to it are generally not questioned. Education is widely acknowledged as an appropriate governmental priority and responsibility, by Governments themselves as well as by civil society; and in most countries Governments are the primary direct providers of formal schooling.

2. International human rights agreements acknowledge both the complexity and the importance of the right to education. It is the subject of two articles (13 and 14) in both the Covenant and the Convention on the Rights of the Child (13 and 28) and appears or is implied in scattered references throughout these and other human rights agreements. This paper focuses on the right to education as delineated in the Covenant, because the Covenant is the principal concern of the Committee on Economic, Social and Cultural Rights. Article 13, which sets forth the scope of the right to education, is the longest article in the Covenant, and arguably the most complex. It addresses, inter alia, the following components of the right to education: formal and informal; academic, vocational and civic; primary, secondary and tertiary; and education for adults as well as children. Article 13 contains aspirational language about the importance of the right, as well as specific guidelines on how to realize it. Article 14 is unusual among the articles in the Covenant in that it does not add anything new to our understanding of the right. Instead, it underscores the fundamental importance of one of the provisions in the preceding article: primary education. What article 14 does is add teeth to the requirement by obligating States to develop within two years of ratification of the Covenant a concrete and detailed plan setting forth how they will implement universal, free and compulsory primary education if they do not already do so. The right to education is balanced between Government's affirmative responsibilities in providing access to education and ensuring that education meets minimal standards on the one hand, and restricting governmental interference in the right of individuals and groups to make basic

decisions about their own and their children's education on the other. The importance of education, both as a right in itself and a means to realize other human rights, its complexity and the acknowledged governmental responsibility for it are distinctive features of the right, as well as factors that simultaneously make compliance with the Covenant both difficult to monitor and vital that such monitoring be done and done well.

II. MONITORING THE RIGHT TO EDUCATION

3. To deal with the complexities and the importance of the right to education, it is necessary to develop effective monitoring strategies. Systematic collection and analysis of appropriate data on educational performance relative to each component of the right to education can serve several functions. It enables countries which have ratified relevant human rights instruments to evaluate their own implementation, identify deficiencies, and formulate educational policies more consistent with the right to education. Monitoring, with appropriate disclosure of the findings, permits public scrutiny of progress and problems. Effective monitoring by non-governmental organizations (NGOs) and by international oversight bodies is also essential if States parties are to be held accountable for compliance or be made liable for violations of the right to education.

4. The dilemma is that neither the Committee nor any other international body has identified appropriate benchmarks for the realization of the right to education, established monitoring methodologies, or delineated the specific obligations of States parties in relation to the components of the right. In general, the implementation and monitoring of the rights articulated in the Covenant, including the right to education, have been hampered by conceptual and methodological difficulties. Much has been written about the lack of intellectual clarity in the definition and scope of these rights. 1/ Understanding of the full implications of economic, social and cultural rights is far less advanced than is the case with civil and political rights. In contrast with civil and political rights, the rights contained in the Covenant, with the exception of the labour-related rights, are not grounded in significant bodies of domestic jurisprudence. Most of these rights were first recognized in the Universal Declaration of Human Rights and then given greater specificity in the Covenant. In addition, the international community has not engaged in systematic norms clarification. Thus far, the Committee has developed only two general comments setting forth the scope of a specific right and the resultant obligations of States parties. Both general comment 4 on the right to adequate housing and general comment 7 on forced evictions address the same right, the right to housing, as articulated in article 11 (1) of the Covenant. The one expert seminar held by the United Nations Centre for Human Rights (now the Office of the United Nations High Commissioner for Human Rights) on indicators to measure achievements in the progressive realization of economic, social and cultural rights, met for only one week, and was unable to go beyond some general methodological parameters. The seminar recommended that the Commission on Human Rights convene follow-up seminars to develop the conceptual content and appropriate indicators for each of the rights enumerated in the Covenant. Although the Commission enacted resolutions in 1994 and 1995 approving the expert seminar's report and affirming the call for rights-specific seminars, these recommendations for follow-up action have yet to be implemented.

5. The different nature of economic, social and cultural rights, the vagueness of many of the norms, the absence of national institutions specifically committed to the promotion of economic, social and cultural rights as rights, and the range of information required in order to monitor compliance all present challenges. 2/ Moreover, the lawyers and diplomats who control the development and interpretation of international law often lack the requisite experience and knowledge to interpret these rights. It is often not appreciated sufficiently that conceptual development of economic, social and cultural rights requires a broadly multidisciplinary approach in which the social sciences may have more to contribute than law and philosophy.

III. THE "VIOLATIONS APPROACH"

6. We believe that difficulties in monitoring economic and social rights have contributed to the tendency to accord more credibility and legitimacy to civil and political rights. Although there are many factors contributing to this situation, the difficulty of defining and applying the standard of "progressive realization" is a major reason. Article 2 (1) of the Covenant, the most authoritative international standard for this category of rights, and the one imposing legal obligations on States parties to it, mandates that a State party:

> "... take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized ...".

This differs fundamentally from the standard set forth in article 2 of the International Covenant on Civil and Political Rights, which specifies an immediate obligation to respect and ensure all enumerated rights.

7. Progressive realization is very complicated to monitor. To do so, it is not sufficient to ascertain current performance. It also requires an ability to gauge trends, specifically whether a State is moving expeditiously and effectively towards full implementation of enumerated economic, social and cultural rights. In order to assess these trends, it is necessary to have comparable statistical data from several years. In addition, because national averages reveal little about the situation of specific groups, particularly those vulnerable communities likely to suffer violations, to be useful, much of the data need to be disaggregated. Relevant breakdowns include gender, race, region, socio-economic groups, urban/rural divisions and linguistic categories. A thorough evaluation would therefore require complicated analyses of an enormous quantity of data.

8. Evaluating progressive realization within the context of the "maximum of available resources" assumes that the valid expectations and concomitant obligations of States with respect to each enumerated right are not uniform, but instead are relative to levels of development and available resources. This necessitates the creation of a mulitiplicity of performance standards to fit the many social, developmental and resource circumstances of specific countries. By extension, it also implies that the standards applied to a specific country would change over time, depending on the economic and political situation. Many Governments do not have the good quality and

reliable disaggregated data needed for this type of analysis. Moreover, many Governments are reluctant to make these kinds of data available to monitoring bodies or NGOs. And if they did, very few NGOs would be able to retrieve and analyse such complex statistical data and manage an information system of the scale needed.

9. The Committee grappled with the difficulty inherent in the standards of "progressive realization" and "maximum available resources" in its general comment 3 on the nature of States parties' obligations, concluding that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party". According to this general comment, a State's failure to meet this minimum core obligation would be a "prima facie" violation of its obligations under the Covenant. The Committee did not provide guidance on how to determine what a State's minimum core obligations are, other than to cite as examples the deprivation of essential food, essential primary health care, basic shelter and "the most basic forms" of education. 3/

10. Instead of attempting to evaluate the degree of implementation consistent with some notion of progressive realization, it seems more fruitful to focus on identifying violations. What is advocated here is the open and explicit adoption of a review process for evaluating compliance which parallels the monitoring of other international instruments. The identification of violations in order to end and rectify abuses constitutes a higher priority than the promotion of progressive realization of the right to education. The monitoring of human rights is not an academic exercise; it is intended to ameliorate human suffering resulting from violations of international human rights standards. An added benefit of focusing on the identification of violations is that it may prove a more effective path to conceptualizing the positive content of these rights than the more abstract and philosophical analyses attempted thus far.

11. A violations approach would also make it easier to identify and specify violations. Such an approach can address the lack of conceptual clarity of many of the rights in the Covenant, which contributes to their second-class status. The Committee's work demonstrates that rights violations can be identified without having to conceptualize the full scope of the right in question and the concomitant obligations of States parties. Although the Committee has not yet set parameters for interpreting each of the constituent rights in the Covenant, its members have come to agreement on a range of concerns and problems relating to the performance of States parties. Each country review includes a profile of these "principal subjects of concern" and the Committee's suggestions and recommendations. As the Committee drafts additional general comments on specific rights and as more NGOs participate in its work, the review process is likely to become even more oriented towards violations.

IV. THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

12. In response to a 1996 article in Human Rights Quarterly by Audrey Chapman, 4/ critiquing progressive realization and proposing a "violations approach", the International Commission of Jurists, the Urban

Morgan Institute of Human Rights of the University of Cincinnati School of Law, and the Faculty of Law of the University of Maastricht in the Netherlands decided to devote a meeting marking the tenth anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 5/ to discussing the nature and scope of violations of these rights. A group of approximately 30 international experts (including Audrey Chapman) met in Maastricht in January 1997 and drafted the "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights". 6/ The Maastricht Guidelines are intended to elaborate on the Limburg Principles with respect to the nature and scope of violations of economic, social and cultural rights; identify appropriate responses and remedies; and assist monitoring and adjudicating bodies to make determinations.

13. According to the Maastricht Guidelines:

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation. 7/

14. The Maastricht Guidelines recognize that just as is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. They also recognize that economic, social and cultural rights impose obligations of conduct or result, depending on the right in question. Moreover, certain groups, particularly those that are already vulnerable and underprivileged, are more likely to suffer disproportionate harm in this respect. These groups include people living in poverty, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless farmers, persons with disabilities and the homeless. 8/

15. The Maastricht Guidelines represent an important step forward in enabling States parties and NGOs to monitor economic, social and cultural rights effectively. Since their drafting less than two years ago, they have achieved wide currency and, like the Limburg Principles before them, appear to be well on their way to becoming the de facto international standard, in this case for conceptualizing violations of economic, social and cultural rights.

V. COMMON VIOLATIONS OF THE RIGHT TO EDUCATION

16. The rest of this paper is devoted to compiling an inventory of specific examples of violations of the right to education. In identifying a violation, we have used the three-part Maastricht framework, with one modification, derived from the Committee's general comment 3 on the nature of States parties' obligations. The right to fulfil in the Maastricht Guidelines is phrased in terms of the "full realization" of the rights in the Covenant. For the purposes of this paper, and consistent with the approach the AAAS Science and Human Rights Programme is taking in developing a monitoring system for violations of economic, social and cultural rights, we are interpreting a violation of the obligation to fulfil as the State's failure to fulfil its "minimum core obligations" with respect to the right to education, if they are not being met by other means, rather than failure to achieve the "full realization" of the right. We believe that limiting the definition in this way is more consistent with a "violations approach". The examples chosen come from a variety of sources. Because there is no common understanding either of the positive content of the right to education or violations of it, the list reflects our own understanding of violations of the right to education. It is offered as a contribution to the process of norms clarification and standard-setting with respect to this right.

A. Type 1: Violations of the obligation to respect

17. The Government interferes with the liberty interests specifically protected in article 13. These include, inter alia, parents' ability to choose their children's schools; provision by indigenous or minority groups of education in their own language and about their own culture; and preventing or inhibiting the establishment and operation of private schools, including religious schools, as long as they meet the educational standards established by the State. As may be anticipated, repressive Governments are generally reluctant to loosen controls over the educational sector.

18. The State invests disproportionate resources in postprimary, especially university-level education, particularly if it comes at the expense of primary education.

19. Numerous States have closed schools and universities for extended periods of time due to the perceived role of educational institutions in fostering political dissent. This deprives many students of the ability to attend school and often shortens the school year to the point where effective education is not possible in the time remaining. In extreme cases particular institutions or levels of schooling have been closed for several years.

20. Violations of academic freedom and censorship can be found in many countries. At the primary and secondary levels, curricula and texts are often required to conform to established government dogma. In higher education, the publications of professors and sometimes their lectures are reviewed, and the individuals and/or their institutions penalized for views which are critical of government ideology or policies. Penalties range from harassment, loss of tenure and dismissal from jobs, to incarceration, torture, and even disappearance or execution.

B. Type 2: Violations of the obligation to protect

21. The Government has not enacted or does not enforce child labour laws. As a result, children are prevented from attending primary (and secondary) education because they are working. The problem is particularly acute if the children are working under harsh or exploitative conditions.

22. The Government fails to monitor and regulate private and religious education to ensure that it is meeting State standards and requirements, including with respect to non-discrimination.

23. Some violations will be violations either of the obligation to respect or the obligation to protect, deperding on whether the school is run by the Government or is private. Some examples are given below.

24. The educational opportunities and facilities available to girls and women are inferior to those provided for boys and men. This may take two forms. The first is the existence of explicit and overt discrimination against girls and women that is included in the rules of the institution (akin to de jure discrimination). Examples include restrictions in the courses girls are allowed to take; fewer resources devoted to girls' athletics than to boys'; and devoting fewer resources to girls' schools in countries where there is single-sex schooling. In the latter category the possibilities include but are not limited to: fewer courses offered, worse infrastructure and educational resources, fewer or less qualified teachers, a curriculum giving more weight to non-academic subjects such as vocational or homemaking skills, or teaching fewer, lower-level or less rigorous science and math courses. In addition, schools may fail to acknowledge and address the existence and effects of gender discrimination on a societal level, including its manifestation in the schools (akin to de facto discrimination). This includes but is not limited to: girls' reduced career and vocational horizons, including the expectation that they will simply marry and raise children and therefore do not need a rigorous or even an academic education; discriminatory treatment or harassment in the classroom and in school generally; failure to recognize and address obstacles to girls' academic achievement, including the fact that they must often work at home, take care of siblings, etc., much more so that boys do; the implications of pregnancy for girls' education; and girls' generally lower self-esteem, self-confidence and assertiveness. Addressing these issues is likely to require some kind of affirmative action approach, which the Covenant permits.

25. Schools fail to accommodate special religious or cultural holidays, so that students are penalized for missing school. Students should be able to make the time or work up, take an exam on a different day, or benefit from some other form of accommodation. The failure of schools to provide similar accommodation for students with disabilities is also a violation.

26. The school may fail to respect students' basic rights in the educational setting, particularly in relation to discipline. For example, corporal punishment, sometimes severe, is common in schools in many countries.

C. Type 3: Violations of the obligation to fulfil

27. Universal, free and compulsory primary education does not exist or is not accessible to all. Characteristics of, or obstacles to accessibility include: schools must be located at not too great a distance from students' homes. There should be no school fees. Indirect costs, not directly related to instruction, should be eliminated. For example, many countries and schools require students to wear uniforms, the cost of which might make schooling prohibitive. Basic textbooks should be provided free of charge or otherwise made available to students, for example through some kind of library system. Education must be made available in a non-discriminatory way, in terms of gender, ethnicity, religion, national origin, socio-economic status, disability status, etc. Basic, primary education should also be provided to all regardless of age. That is, all adults should be able to obtain a primary education, not by being mixed in with children in the regular school system, but through special programmes at night or at other convenient times, that take note of adults' work and family responsibilities.

28. Inadequate, substandard school facilities may make the promise of free, primary education illusory even where it exists. The following are some of the considerations entailed in making this assessment. School buildings and classrooms should be in adequate condition and reasonably well equipped. Sufficient textbooks should be provided free of charge. The student-teacher ratio should be acceptable, so that teaching and learning can actually take place. Teachers should be qualified to teach the subject(s) and grade levels they are responsible for. Students' physical safety must be assured. The academic year must contain enough days of instruction to cover the required material for the year. For example, in some countries, holidays are frequently called for political reasons, disrupting the flow of instruction and reducing the amount of material that can be covered. All in all, a climate has to be provided in which learning can take place.

29. Adult basic education and/or literacy training is not provided or is not accessible. All adults should be able to read, write and have basic arithmetic skills, and should have the opportunity to acquire basic vocational skills.

30. The Government does not develop the detailed plan to implement universal, free and compulsory primary education called for in article 14 within the two-year time period allowed.

31. Gross disparities exist between educational facilities in different regions or different settings, for example, between rural and urban schools, between inner city or other schools, between poor school districts and rich school districts. Different, and worse, standards and facilities may exist where particular ethnic groups or disadvantaged people are predominant, e.g. Indian reservations, other regions where ethnic minorities or indigenous groups live, or refugee camps.

32. There is retrogression from levels or results previously achieved, whether as a result of externally imposed factors such as structural adjustment programmes or as a result of internal dynamics, such as a reduction

in social spending. The Covenant does allow for retrogression for short periods of time, generally in response to events outside the country's control. However, the effects must be limited in time, and the burden of proof is on the State to show why it was not able to meet its obligations.

33. In cases where the State party is constrained to cut back social spending, such as under IMF imposed conditionality or economic deceleration, there is a requirement that the Government protect the educational access of the most vulnerable groups. The failure to undertake "adjustment within a human face", such as the introduction of across-the-board school fees without special allowances for poor areas, has precipitated disproportionate reductions in school attendance among underprivileged communities. The rates of enrolment of girl children have declined seriously in many countries because of the failure to make special provision for them.

34. The Government does not develop or implement programmes targeted at particularly vulnerable children, such as homeless, abandoned and street children; refugee children; or children of illegal immigrants, to ensure that they attend school.

35. The Government fails to ensure that basic education is provided to all members of the population (of all ages) in the rights and responsibilities of citizenship. This can and should incorporate human rights education.

36. The Government does not provide educationally adequate means for members of linguistic and/or cultural minorities to learn the national language and the ways of the mainstream culture that will enable them to participate fully and actively in all aspects of it to the level they wish.

Notes

1/ See, e.g., Philip Alston, "Out of the Abyss: The Challenges Confronting the new U.N. Committee on Economic, Social and Cultural Rights", Human Rights Quarterly, vol. 9, 1987, p. 332.

2/ On these problems, see Philip Alston, "The Committee on Economic, Social and Cultural Rights", in The United Nations and Human Rights: A Critical Appraisal, Philip Alston (ed.), Clarendon Press, 1992, pp. 490-491.

3/ HRI/GEN/1/Rev.3, part II, general comment 3, para. 10.

4/ Audrey R. Chapman, "A 'Violations Approach' to Monitoring Economic, Social and Cultural Rights", Human Rights Quarterly, vol. 18, 1996, p. 23.

5/ The Principles and a series of related papers are found in "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", Human Rights Quarterly, vol. 9, 1987. The entire issue is devoted to this subject.

6/ The text of the "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" has been reproduced in at least two publications. It appears in the August 1998 issue of Human Rights Quarterly, (vol. 20, 1998, p. 691). It is also reprinted in International Commission of Jurists, Economic, Social and Cultural Rights: A Compilation of Essential Documents, Geneva, 1997, pp. 79-92.

7/ Maastricht Guidelines at II, para. 6.

8/ Ibid. at IV, para. 20.